STATE OF MICHIGAN

COURT OF APPEALS

DONNA LOFTIS,

Plaintiff/Counterdefendant-Appellant,

v

SHAWKEY A. HASSAN, FIKRIA E. HASSAN, ARABIANS OF THE NILE, INC., and BARRON PRECISION INSTRUMENTS, L.L.C.,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
May 19, 2005

No. 253331
Genesee Circuit Court
LC No. 01-071860-CH

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting defendants' motion for summary disposition of her prescriptive easement claim, and also the trial court's order awarding defendants attorney fees and costs on the basis that plaintiff's defense of defendants' counterclaim for trespass was frivolous. We affirm the dismissal of plaintiff's prescriptive easement claim, but reverse the trial court's award of costs and attorney fees.

Plaintiff owns lot ten of the Warwick Farms Subdivision. She purchased the property on December 6, 1996, from Catherine and William Leoni. Defendants are the successors in interest to the developers of the subdivision. At issue in this appeal is a strip of land that is situated between lot ten and the subdivision's lake. Plaintiff filed this lawsuit, alleging a prescriptive easement over the disputed property. Defendants filed a countercomplaint alleging that plaintiff was trespassing on the property.

On appeal, plaintiff first challenges the trial court's decision granting defendants summary disposition of her claim alleging a prescriptive easement to the property.

This Court reviews de novo a circuit court's decision with regard to summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a

light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999), citing *Marx v Dep't of Commerce,* 220 Mich App 66, 70; 558 NW2d 460 (1996).

An easement signifies the right to use someone else's land for a particular purpose. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 678-679; 619 NW2d 725 (2000). An easement by prescription results from using another's property in an open, notorious, adverse, and continuous manner for fifteen years. *Id*. at 679. Mere permissive use does not create a prescriptive easement. *Id.* Here, plaintiff had the burden of proving that the nature and length of her use of the property was sufficient to ripen into an easement by prescription. *Id*.

Because plaintiff did not purchase lot ten until 1996, the only way she could establish the necessary hostile use of the disputed property for the requisite fifteen-year period was to tack on the possessory periods of her predecessors in title. In this regard, plaintiff was required to demonstrate privity before she would be permitted to tack her predecessors' possessory periods.

While privity can be shown by "an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance," *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001), citing *Sheldon v Michigan Central R Co,* 161 Mich 503, 509-510; 126 NW 1056 (1910), the submitted evidence here established that there was no genuine issue of material fact regarding any oral statements made at the time lot ten was conveyed to plaintiffs concerning transfer of the disputed property. While a seller's disclosure statement from the Leonis, plaintiff's predecessors in interest, referred to an easement around the lake, this did not establish that the Leonis purported to orally transfer the interest in the disputed property to plaintiff. On the contrary, the Leonis submitted an affidavit wherein they denied ever making any parol statements transferring the property to plaintiff. Therefore, plaintiff was unable to demonstrate privity and could not tack the possessory periods of her predecessors in interest. Without tacking, plaintiff could not demonstrate the requisite hostile use for the necessary fifteen-year period to establish a prescriptive easement. Accordingly, the trial court properly dismissed plaintiff's claim for a prescriptive easement.

Plaintiff also challenges the trial court's decision to award defendants costs and attorney fees. Defendants asserted that they were entitled to costs and attorney fees under MCL 600.2591, because plaintiff's defense of the countercomplaint for trespass was frivolous, given the trial court's earlier determination that plaintiff could not establish a prescriptive easement over the property.

This Court reviews a trial court's findings regarding frivolousness for clear legal error. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002), citing *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). The trial court indicated during the hearing on plaintiff's motion for reconsideration that it agreed with defendants' position on the matter. Defendants had previously argued that plaintiff had no reasonable basis to believe that the alleged facts were true, and plaintiff's defense had no arguable legal merit because plaintiff had essentially pleaded trespass in her complaint when she claimed adverse possession. Therefore, although the court

could have made more definitive findings, the court indicated that it found plaintiff's defense frivolous pursuant to MCL 600.2591(3)(a)(*ii*) and (*iii*).

With respect to whether plaintiff's claim was frivolous, the relevant inquiry is whether the claim or defense was frivolous at the time it was asserted. *Jerico Constr, Inc, supra* at 36. Both plaintiff and her husband both indicated in their deposition testimony that when they purchased lot ten from the Leonis, the Leonis informed them that the Leonis exclusively used the strip of land situated between lot ten and the subdivision's lake in a manner that would satisfy the requirements for adverse possession. Plaintiff and her husband observed various physical signs of possession on the disputed strip including a previous deck, cement steps, patio stones, railroad ties, tall pine trees planted by predecessor owners, and a septic tank. Plaintiff testified that Mrs. Leoni told her she could use the lake in the same manner, and plaintiff would not have bought the property if she had not believed she had the right to use the strip of land.

From the time they purchased lot ten until November 2001, plaintiff and her husband testified that they exercised ownership over the disputed strip without seeking or receiving approval from defendants. They brought in topsoil, planted grass, installed a sprinkling system, and replaced the deck with an elaborate patio. Although later affidavits from the Leonis did not sufficiently establish the tacking requirement necessary to maintain the fifteen years of prescriptive use, this did not mean that plaintiff had no reasonable basis to believe that the alleged facts were true. "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico Constr, Inc, supra* at 36, citing *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986).

Moreover, a claim or defense is only devoid of arguable legal merit when there clearly are no legal grounds to support it. See *Taylor v Lenawee Co Bd of Rd Comm'rs*, 216 Mich App 435, 444-446; 549 NW2d 80 (1996), *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 267-268; 548 NW2d 698 (1996), and *Kitchen*, *supra* at 662-663. Michigan jurisprudence recognizes quiet title actions for prescriptive easement and adverse possession. See, for example, *W Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Plaintiff relied on her claim to a prescriptive easement over the disputed property as the basis for defending defendants' trespass action. Had plaintiff succeeded in her suit, defendants' claim for trespass would have failed. See *Plymouth Canton Crier, supra* at 681, quoting *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995) ("'Adverse or hostile use is use inconsistent with the right of the owner . . . as would entitle the owner to a cause of action against the intruder' for trespassing").

Furthermore, the trial court's order appeared to be inconsistent with its earlier September 9, 2002 order wherein it granted defendants summary disposition of plaintiff's prescriptive easement claim, but, not having found plaintiff's prosecution of her prescriptive easement claim to be frivolous, denied defendants' claim of attorney fees and costs. Logically, if plaintiff's prosecution of her prescriptive easement claim was not frivolous, her continued reliance on that unresolved claim between February 25, 2002, and September 9, 2002, to defend defendants' trespass claim should likewise not be considered frivolous.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood